PROCEEDINGS

OF THE

MASSACHUSETTS HISTORICAL SOCIETY.

NOVEMBER MEETING, 1918.[1]

THE stated meeting was held on Thursday, the 14th instant, at three o'clock, P. M.; the PRESIDENT, Mr. LODGE, in the chair.

The record of the last meeting was read and approved. The Cabinet-Keeper reported the following accessions:

From Richard Henry Dana, the deposit of the death mask of Washington Allston.

From Miss Annie H. Thwing, a specimen cable made by Glass, Elliot & Co., gutta percha manufacturers of London, in 1856, for Cyrus W. Field, in preparation for making the first Atlantic Telegraph Cable, and given to her father, the late Supply Clap Thwing; also a collection of Rebellion envelopes, note headings, Confederate money, and three pieces of scrip issued by Harris and Chapman of Boston, on December 1, 1862.

From Fred A. Hallett, a working model of the railroad equipment on the Boston and Lowell Railroad, the first organized of the Boston roads, upon which the work of construction was actually begun. The road was opened in June, 1834, and the model was made soon after. It represents the form of ties, tracks, fish plates and switches then in use, and includes an earth car, pile-driver, road-bed hammer, hand-car, locomotive, tender, and passenger car. As a model of what was in use in the early days of railroads in Massachusetts it has a high historical interest.[2]

From Frederick Nordstrom, of Malden, a photostat of an engraved view of the Boston Exchange Coffee House, Congress Street,

[1] The meeting of October was postponed because of the prevailing epidemic of influenza, then at its height. Except for a holiday and a suspension for three months during repairs to the old building, the Society has not passed a stated meeting since its first meeting of January 24, 1791.

[2] See Winsor, *Memorial History of Boston*, IV. 126.

which appeared in *Omnium Gatherum* (Boston), Volume I. No. 1, for November, 1809.

From George A. Mower, two engravings, "The American General [Charles] Lee taken Prisoner by Lieutenant Colonel Harcourt of the English Army, in Morris Country, New Jersey, 1776," engraved by Hawkins, and "The Unfortunate Death of Major André (Adjutant General to the English Army) at Head Quarters in New York, Oct^r. 2, 1780, who was found within the American Lines in the character of a Spy," engraved by Goldar, both from Barnard's *History of England.*

From Mrs. William R. Thayer, an engraving by Henry S. Sadd of Benjamin Franklin from a painting by T. H. Matteson, and a lithograph of Daniel Webster.

From George L. Shepley, two pieces of Rhode Island money, 1786, ninepence, and two shillings and sixpence.

From George B. Brayton, a photograph of the State House, 1918, showing the two wings as completed.

From the Comité France-Amérique, which is founded for the purpose of developing the intellectual and social relations between France and the United States, a bronze replica, 1918, of the Medal of the Comité France-Amérique given at Harvard University annually to undergraduate students for the best essay on some aspect of French civilization. This medal is a restrike of the Washington evacuation-of-Boston medal.

The Corresponding Secretary reported the receipt of a letter from Nathan Matthews, accepting his election as a Resident Member of the Society, and one from Frederick Scott Oliver, of London, England, accepting his election as a Corresponding Member.

The Editor reported the following accessions of MSS.:

By gift: From George Peabody Wetmore, an autograph album made by John Locke (1764–1855), who was a member of Congress from Massachusetts, 1823–1829. It contains a number of signatures, autograph and engraved visiting cards, and invitations to social events of that time, and constitutes a valuable record of social usage.

From Robert Grant, a letter of Alexander Grant to his nephew Patrick Grant, from St. Petersburg, March 10/22, 1840.[1]

From Grenville H. Norcross, twelve essays in MS. by William Everett.

[1] See p. 31, *infra.*

From Miss Mary Perkins Quincy, a photostat copy of a Commonplace Book of Edmund Quincy, 1737–1776. Professor Wendell has added photostat copies of a series of letters from Edmund Quincy to John Wendell, 1767–1785.

From the family of James Gardiner Vose, record books of Col. Joseph Vose of Milton, 1760–1788, including some military records of the 1st Massachusetts Regiment, 1777–1783.

From Prof. Charles Robert Cross, of the Massachusetts Institute of Technology, a collection of Cross Papers, 1776–1829, chiefly relating to Newburyport.

From Miss Susan Hopkins, the papers of Mark Hopkins, 1790–1887.

From John W. T. Nichols, a letter of Henry Clay to John W. Treadwell, May 27, 1831.

From Frederick W. Hinkle, a deed signed by Andrew Lane, 1741.

By purchase: Papers of Samuel F. McCleary, 1704–1899.

Medfield papers, 1677–1800.

Note-book for 1746–1775 of Nathaniel Rogers (1723–1803).

Papers, journals and note-books of John and Stephen Metcalf, of Bellingham, 1727–1836.

Papers of Benjamin Harris, once collector of the town of Boston, covering the period from 1753–1809; Child Papers, 1765–1875; of Samuel B. Edes, 1799–1801; of William Jarvis, of Weathersfield, Vermont, 1799–1843; and of Benjamin McKendry, 1811–1815.

Invoice and sales book of Captain John Nutt, 1772–1784.

A volume of printed bonds, Boston, 1784–1804.

Tax lists of the Middle District of Edgecombe, Maine, 1796, copybook of Tristram Little, 1800, interesting for a poem and epitaph on General Washington.

Diary of Sarah W. Noyes, of Andover, 1808–1814.

The PRESIDENT announced the death of four members of the Society since the June meeting:

Charles Russell Codman, who died October 5, 1918, was elected in 1893.

Andrew Dickson White, died November 4, 1918, was elected a Corresponding Member in 1879, and raised to the Honorary roll in 1911.

Charles Henry Hart, died July 29, 1918, was elected a Corresponding Member in 1878.

Rev. Charles Richmond Weld, died in England, September 11, 1918, was elected a Corresponding Member in 1883.

The PRESIDENT then said:

I cannot allow this meeting to pass — and I am sure the Society would not wish me to do so — without a word as to the supreme event of the week, which is uppermost in every one's mind. The German armies have been defeated and have agreed to terms which constitute an unconditional surrender. The greatest war in recorded history has thus come to an end with the greatest victory ever won for freedom, humanity and civilization. We may well feel a solemn pride in the great result, and it is worthy of mighty rejoicing.

Much still remains to be done. Hostilities have been suspended, but peace is still to be made. We must have a peace that will be both real and enduring, and that can only be accomplished by putting Germany under physical guaranties, in such a position that she can never break forth again upon the world with a war of conquest. There are many difficulties to be faced and not the least is the fact that the convulsion caused by the war has produced in Russia what is known as Bolshevikism. We have been contending with a tyrannous military autocracy and organized barbarism, the tyranny of discipline and order. With the Bolsheviki we have the tyranny of disorder, as odious if not as dangerous to the world as that of Prussian militarism. With the tyranny of disorder, which is anarchy, pillage, famine and murder go hand in hand. It will be the duty of free and civilized nations to overcome this anarchy as they have overcome Germany. Then comes the work of reconstruction which the war has made necessary and inevitable.

These are the problems which the United States has to face. May we succeed with them as we have succeeded in our war with the German Empire.

Mr. BOWDITCH notified the Society of the special deposit by the American Academy of Arts and Sciences of certain volumes from its Library, subject to recall by a vote of its Council.

Professor BASSETT read a paper on Henri Harrisse, and Mr. RHODES, one on questions arising out of the presidential election of 1876.

Medals, Miniature and Profile Painting and Shades.

THE Publick are reſpectfully informed, that the ARTISTS, who took the moſt correct likeneſs of the PRESIDENT of the UNITED STATES, and executed a Medal of him, are at the Houſe of Mr. JOHN COBURN, in *State Street*, and will continue for one month only, to take the moſt correct likeneſſes in two minutes ſitting; and finiſh them from *one dollar*, to *three*, or a Miniature from *ſeven* to *fourteen dollars*. They likewiſe execute the moſt elegant Devices in hair, on various ſubjects, and have a variety of faſhionable *Gold Lockets*, adapted for that purpoſe and for Miniatures, with a number of Medals, ſtruck in memory of various periods of the American war. Alſo, of the late Doctor *Franklin*, and that moſt approved *Hiſtorical Medal* of the PRESIDENT of the *United States*; acknowledged a ſtriking likeneſs: Nothing was ever ſo well calculated to tranſmit to poſterity, the memory of the friends and patriots who ſerved their country. They are the laſting monuments of publick reſpect, and publick gratitude; and the only thing which keeps pace with the tide of fleeting time, as every age increaſes their value.

In ſome friendly Patriots cabinet, ſecure they lie,
From rage of popular commotions, or inclement ſky
And like time itſelf, paſs on to all eternity.

They may be had as above, in white and gold coloured Metal and Silver, at *one*, *two* and *four* DOLLARS each, where ſpecimens of the ARTISTS' ability in Painting and Hair Work may be ſeen.

THE publick may depend on particular and obliging attention. *Ladies* and *Gentlemen* who read the above, are requeſted to communicate it to their friends.

All who wiſh to have any of thoſe articles, will pleaſe to apply ſoon, as the ARTISTS cannot ſtay longer than the time propoſed, having engaged to go to *Carolina* in the next month.

N. B. That all Perſons may have an opportunity of purchaſing thoſe Medals, a perſon will be appointed to wait on Ladies and Gentlemen, at their Houſes.

TAVERN-KEEPERS will oblige the ARTISTS, by puting this up in ſome conſpicuous part of their publick rooms.

BOSTON, SEPTEMBER 23, 1790.

Printed by N. COVERLY, at the ſign of the *Grand Turk*.

Dr. STORER spoke on

THE MANLY WASHINGTON MEDAL.

The interesting broadside here reproduced from the original in the papers of Caleb Davis, given to the Society by Dr. George B. Shattuck and Dr. Frederick C. Shattuck, must be one of the earliest records of any numismatic transactions in this country. It was also inserted as an advertisement in the *Columbian Centinel*, October 2, 1790. The medal of Washington referred to is undoubtedly that issued by James Manly[1] of Philadelphia early in 1790. I have found in W. S. Baker: *Medallic Portraits of Washington* (p. 40) an advertisement signed by Thomas Mifflin, Governor of Pennsylvania, dated February 22, 1790, stating that "to subscribers a medal [of Washington] will be delivered of fine white metal, to resemble silver, for one dollar; of a fine gold colored medal for two dollars; of fine silver, for four dollars; and of gold, in proportion to weight." The Manly medal, by the way, was the first Washington medal issued in this country. It will be noticed that in the Boston broadside no medals are offered in gold. The demand for them in that metal cannot have been large as I have placed on the table the only known specimen, which came to us in the Appleton collection. The "artists in attendance" were presumably Samuel Brooks[2] of Philadelphia, who executed the medal, his name being on the foot of the bust, and Joseph Wright[3] of Bordentown, New Jersey, who modelled the bust. You will see that the artists offer to give anyone a correct likeness for from one to three dollars as a result of a two minutes' sitting. Evidently these were specimens of "profile painting" or, I suppose, touched-up silhouettes. In 1790 three

[1] Nothing is known of James Manly except that he was probably an Englishman. His will, signed July 27, 1795, was probated August 11, 1795, and mentioned a son Charles, of the city of London, but neither wife nor other child. He was buried in Christ P. E. Churchyard August 9, 1795. I am indebted to Mr. John W. Jordan of the Pennsylvania Historical Society, for this information.

[2] Is this the engraver who is listed in Stauffer, I. 29, of whose work only a single example is known — a bookplate made for Dr. J. Dove, of Richmond, Virginia? "The plate," adds Stauffer," is poor enough to be early American work." That Brooks was "living about 1800."

[3] An account of Joseph Wright and his Washington portraits will be found in Baker, *Engraved Portraits of Washington*, 46. A fair copy of Wright's profile portrait of the President is in the *Massachusetts Magazine*, March, 1791.

Manly Washington Medal

dollars was a fairly large sum for a portrait done in two minutes. It is to be hoped that the likenesses were better than that of Washington on the Manly medal which is certainly far from flattering and represents the President as very aged and haggard, in spite of the fact that in his advertisement Governor Mifflin asserts that the portrait is "a strong and expressive likeness, and worthy of the attention of the citizens of the United States of America." Evidently in 1790 the good people of the United States had not yet determined that they wished posterity to think of the Father of the Country as having the kindly visage familiar to us from the Stuart portraits.

This bust by Wright was also used for a medal of Washington designed to be used in the civic procession in Boston, February 22, 1800. This medal is extremely rare, only three specimens being known, the copy in the Society's collection being an electrotype. It was probably never actually issued owing to the carelessness of the die-cutter in omitting the word "in" from the inscription HE IS IN GLORY THE WORLD IN TEARS. It was designed by Dudley Atkins Tyng of Newburyport and executed by Jacob Perkins of the same place.

The medal of Franklin referred to may have been that struck in 1762 in honor of his reception of the Doctorate of Laws at St. Andrew's, Edinboro, but was more probably that struck in 1777 with the inscription NON IRRITA FULMINA CURAT. These two and the medallion by Nini (1777) were apparently the only Franklin medals struck before 1790.[1]

Mr. BIGELOW communicates the following paper on

BECKET AND THE LAW.[2]

In a former paper [3] I spoke of the contest between Henry II and Becket from the point of view of sovereignty; in this paper

[1] All three of the Franklin medals are in the Society's collections.

[2] I have throughout this paper referred to Giles' "Life and Letters of Becket," and to Hutton's "St. Thomas of Canterbury," because the passages quoted or cited are given by them in translation. The originals may all be found in *Materials of the History of Thomas Becket*, Master of the Rolls, 7 vols.

It is interesting to note that this paper is written in the year in which falls the 800th anniversary of the birth of Becket (1118). The precise date is unknown.

[3] *Proceedings*, LI. 116.

I speak of it from the point of view of law and morals. The question will still be one of the collective mind against self-centered individualism, but the focus will be shifted to morals, to collectivism founded on law in morality; at the same time steering clear of all speculative questions.

Undisciplined individualism may flourish under conditions of order or of disorder; with this difference, that it is less objectionable in the latter than in the former case, since it has the excuse of necessity. That was true in the disorder of Stephen's reign; every one had to look out for himself if any thing was to be saved from the ruin. This was true of churchmen as well as laymen. Was it to result in a general eclipse of morals, making sordid interests with all men an end in life; was individualism to become master where it should be servant; was this to be true in the councils of the Church as well as among the gentry and the less instructed masses? The records of crime were growing ominous; churchmen were becoming too often an example of a lost ideal. "Can an archdeacon be saved?" sighed John of Salisbury.[1] Was individualism of the sordid kind to fix its hold upon Englishmen and leave them in hopeless inability to unite? Opportunity, with the man for it, was to appear, an opportunity to be seized or lost, once for all.

Upon the restoration of order under Henry, the Becket conflict took up the question. Becket called, and never ceased to call, upon his fellow churchmen to rise from doubt and self-indulgence to the great occasion, and help assert and establish moral principle. He himself would of course uphold the rights of men in their just material interests, but such things must be in their place, however clear the need of action. Would Becket's fellows agree? They must, for it was the command of God, and Becket was the divinely appointed leader, to turn back the tide of selfish movement and replace it with the power of moral purpose as the universal solvent, if only put into active operation, of the ills of men. "If," said Becket to the

[1] Repeating a question of the schools. Stubbs, *Lectures on Mediæval and Modern History*, 139. See the complaints in the year 1158 of the exactions of archdeacons and rural deans, who escaped punishment by successfully denying the jurisdiction of the secular courts. William Fitz-Stephen, Hutton, 34, note. It is said that a hundred cases of homicide by churchmen had taken place in the disorders. William of Newburgh, I. 140; *History of English Law*, I. 437 *n*. See also Stubbs, *Lectures*, 132, 303, 314.

clergy, "it be a question of temporal matters, we should rather fear the loss of souls than of temporalities. Scripture saith, 'What doth it profit a man to gain the whole world and lose his own soul?'" [1] With the passion of such words would Becket rouse and rally the clergy of England.

What sort of man in other respects Becket was must now be noticed. He had been educated in the Pandects and in the canon law; he had studied both, with full desire as the event showed, at the great schools; in Italy, at Bologna and Pavia; in France, at Paris and Auxerre. Afterwards we find him on the staff of his educational mentor, Archbishop Theobald; and in that house of Roman learning he is instrumental — on the occasion when Theobald wished to supplant Henry of Winchester as papal legate — in bringing to England a number of Italian lawyers, among them the famous Vacarius, who was to teach Roman *civil* law at Oxford in the year 1149, and to compose (for poor scholars) nine books out of the Pandects.[2]

One cannot be mistaken in regard to the effect of this training and association. It could not have failed, when, on Theobald's recommendation, at the beginning of the reign of Henry II, Becket was appointed chancellor (December, 1154), and so came into actual relations with the administration of the secular law as such,[3] the law corresponding of course to Roman civil law; for he was now keeper of the King's seal, superintendent of the King's writs by which suits were to be brought in the royal courts, a member of the Court of Exchequer, and one of the staff of royal judges of highest rank. Indeed Becket never ceased to be devoted to the study of Roman law. As late as in the year 1166, after his fight against the Constitutions of Clarendon had been lost, he was still applying himself to it. John of Salisbury, himself a canonist on the staff of Becket at Canterbury, now, like Becket, in exile, tells us this in a letter in which he gently reproaches his master for giving himself, at

[1] Giles, I. 363; and much more to the same effect.

[2] ". . . when Vacarius was teaching law, and Theobald was maintaining the schools of literature in his own palace, from which so many conspicuous men afterwards sprang." Stubbs, *Lectures*, 139.

[3] It was not because Becket was chancellor in the modern sense, that he stood upon equity or canon law, for there was no Court of Chancery then or for more than two hundred years; equity had become woven into the very texture of his mental make-up. It was *Becket*.

such a time, to vain pursuits. "The laws," by which he meant the canon law and the Pandects or Digest, he says, "may profit much, but they are not for us, under our circumstances."[1]

Roman law was, as John complained, taking the place of devotions. But the learning of it had always been a practical matter with Becket. Both as chancellor and as archbishop he was very near the King, down to the time of the breach. The pope had said that one near the King should understand both the canon and the civil law; this was necessary for the chancellor to enable him to advise the King properly in regard to matters of government, at least in point of morals, for he had the King's conscience in charge. He was as far as possible to prevent any violation of the canons, and by plain inference to see to it that the King's writs were not opposed to equity and justice — terms often used by Becket, as the very voice of the canon law.[2]

If Becket was led by education for his special work, he was no less destined to it by indomitable courage and firmness. This was soon to be shown. He had scarcely become archbishop (1162) — he had served seven years and a half as chancellor — when troubles began to thicken in high places. Tares had already been sown; the King was being alienated; bishops were withdrawing support, for fear of lands and goods. Becket engaged the enemy at once. The powerful Earl of Clare must give up the castle and barony of Tunbridge, held by him under unlawful alienation from Canterbury. The King was opposed to his face, in an attempt (1163) to divert to his own treasury what we should call commission fees received by the sheriffs in the collection of land taxes as of the old Danegeld.[3] The sheriffs might have the money, said Becket, in payment for services; it should not go to the King. The King replied with a favorite blasphemous oath, that the money should be given to him; "in the King's roll," (that is, in the Exchequer) "it shall

[1] Giles, I. 129, 130, 310.

[2] "The chancellor," said John of Salisbury, a canonist with Becket, "cancels unjust laws, and tempers (*æqua facit*) the mandates of the pious prince," with consent of course of the prince. Giles, I. 99 (1160). The reference is to Becket and equity, as the date shows. Becket was chancellor and had been for five or six years.

[3] *Dialogue of the Exchequer*, Lib. i, c. xi; Stubbs, *Select Charters*, 203; *Historical Documents*, Henderson, 69.

be writ." "By the same oath," said the archbishop, "from my lands and Church not a penny."[1] The King was enraged; Becket had foiled him. I refer to this and similar things not as relating to church rights, but to show Becket's mental character.

Such things were going on from the first; while at the same time the troubles which culminated in the Constitutions of Clarendon (January, 1164) were already brewing. It was left to the contest which followed to furnish the decisive evidence of Becket's character, and to attest his greatness. "Whatever the capricious tyranny of our persecutor may threaten," said Becket in a characteristic way, adapting the language of St. Paul, "yet by God's mercy neither death nor life, nor angels, nor any other creature shall separate us from the love of God, which has caused us this present tribulation." God's enemies "may strain till they burst, they shall never, by Christ's grace, make me deviate from the path of justice." He would "endure exile and proscription forever, and death in a just cause, if it pleased God." Such was Becket's courage and firmness as a leader; and the event proved his sincerity, if proof were needed.[2]

Returning to his legal training, Becket made it clear what his idea of law was. Generalizing the principle he professed, one may put it thus: the basis of all law, human and divine, was morality or conscience, as expressed in the canons of the Church; this must control conduct. Only upon such footing could human law operate equally among men, and all things of providence be considered as "the very own of all folk"; which was to be made true to the extent of Becket's power.[3] Law which violated morals in that sense was self-seeking individualism, to use the modern word; that is, it was discrimination against the many in favor of the few, and turning that which should be servant into master. Becket would say, with the citizens of 1791, there should be one law for all.[4] Becket always empha-

[1] E. Grim in *Select Charters*, 129 (1163); Hutton, 37; Giles, I. 161, 162. The landlords of course compelled the tenants to pay.

[2] Becket's secret flight from Northampton to France (1164) was in pursuance of his own appeal to the pope, and in defiance of the King's requirement of permission by him. It was not cowardice.

[3] Thomas Saga, Hutton, 32; paper on "Medieval English Sovereignty," December, 1917, *Proceedings*, LI.

[4] What Becket could have done, had he lived, in regard to the gifts of providence, "the very own of all folk," touching privilege and inequality of status,

sized the distinction between morals and that which was simply of man's device for self-aggrandizement. Writing to Conrad of Mayence (to give a single, but characteristic instance) about certain ills that had overtaken the Church in Italy, Becket asks in reproach, how it could have happened otherwise seeing that Conrad had always sought for what concerned himself, rather than for the praise of God. Here he touched, as we shall further see, the very point of his opposition to the Constitutions of Clarendon;[1] such of these as were considered to be contrary to the canons (as creating an improper jurisdiction in the secular courts) were so because they were set for the personal aggrandizement of the King or barons.[2] Indeed taking Becket's mode of life as springing from his idea of law, as the Church would justly insist to be a test if not *the* test in all cases, we know that he would have said that law consists in the due control of the lower nature of man by the higher.[3]

Such was the principle upon which law was based. Then, in consequence, comes — I do not say in direct sequence of time, for the foregoing is a summary of a long affair, but there comes before hope is abandoned — a declaration of the realm of law, formally stated. In a letter written in the year 1166 to King Henry, Becket said: "The Church of God consists of two orders, clergy and people. Among the clergy are apostles, apostolic men, bishops and other doctors of the Church, to whom is committed the care and governance of the Church;

I do not venture to consider; that question would be speculative. But in regard to equity the case is different. See *infra*.

[1] Stubbs, *Select Charters*, 137; Hutton, 50, pointing out the articles objected to.

[2] The Constitutions appear to have been the King's way of strengthening himself, by bringing over the barons whom he had at first had to put down. Note the composition of the court; all of the bishops (there were several vacancies) and all of the great barons, by name, the former in fear, the latter elated (Giles, I. 384, 385), for the Church was to lose to King and baronage. It appears to have been as adroit as it was successful; "the King's sword," said Becket (Giles, I. 256), was to oppose the cross, the representative of the moral and enlightened civilization — the lower nature was to gain over the higher. And this, as will appear, without any attack upon canon law itself; did not the King admit that law, by sending the Constitutions to the pope for consideration? But Becket stuck to the very issue of the Constitutions; he never went "outside the record" to deeper questions of conflict between "flesh" and "spirit." This question of the Constitutions was not so radical; the pope was not very ardent and might have allowed the Constitutions but for Becket.

[3] See note, p. 30, *infra*.

who have to perform ecclesiastical business, that the whole may redound to the saving of souls. . . . Among the people are kings, princes, dukes, earls and other powers; who perform secular business, that the whole may conduce to the peace and unity of the Church." [1]

Here was a division both of the realm of law and, in consequence, of administration; law and administration being of necessity alike fundamental.[2] Here for the first time in England is disclosed a system. The two divisions, belonging alike to the Church of God, stood, it is plain, upon an equality within the defined spheres; in rights of government the people were equal to the clergy. "Render unto Cæsar the things that are Cæsar's, unto God the things that are God's." All this followed. The chief difference (so far as the present purpose is concerned) lay in the fact that administration of ecclesiastical law led by right of appeal to Rome, while that of secular law, whatever the theory, was in point of fact purely and finally a matter of the domestic forum. It was only, at the most, on the ground that the domestic authority was encroaching upon the jurisdiction or rights of the Church, as in the case of the Constitutions of Clarendon, or perhaps in the converse case, that secular law was to be reviewed by the authorities of the Church. In intent and purpose canon law was superior to secular law; so Becket always held.[3] But the intent could not at all times be carried out, as Becket would equally have admitted. Secular law, for instance, permitted vengeance, with limitations; it attached guilt to animals and inanimate moving objects; such ideas of

[1] Hutton, 122. So held the founders of Massachusetts. "When a commonwealth hath liberty," said Cotton, "to mould its own frame (*Scripturae plenitudinem adoro*), I conceive the scripture hath given full direction for the right ordering of the same." *Massachusetts and its Early History*, Ellis, 53. See also Judge Parker on the first Charter, *ib.*, 389.

[2] And they must be alike intrusted to earthen vessels, clergy and lay. The division together with the divine basis of law was right then, and always is, but difficulty comes with administration, for that is sure to bring principle into conflict with self-interest, the earthen vessel.

The question, however, of Church and State — whether in temporal affairs the Church is parent or offspring of the State — is speculative. See note at end of this paper.

[3] For instance, in the letter to the King (1166) already referred to, Becket says, "And since it is certain that kings receive their power from the Church, not she from them but from Christ, so . . . you have not the power to give rules to bishops, . . . to draw clerks before secular tribunals," etc.

primitive times still prevailed in the very face of the enlightened canon law of morals. But considered in itself secular law, no less than ecclesiastical law, was divine; it was always divine when founded upon equity and morals. And so Becket could say, "We owe obedience to our lord the King by divine law." [1] It resulted that men, whether lay or clergy, could not make or unmake law, in the final sense; men might supply deficiencies, as time and circumstances required, if the additions were consistent with the divine law; they might regulate, interpret, administer, with the same limitation. Further they could not go without violating God's law; which (to return) was for all men alike, the people as well as the clergy. So are we I think to interpret Becket's part in the conflict over the Constitutions of Clarendon.

And I take it that Becket's contention against the Constitutions was only a special exemplification of his doctrine. A concrete question, slowly developing, had finally taken its own particular form, of a question between Church and State. An emergency to be met at once, and with every resource possible, had arisen. Becket had but come to face and fight a particular aggression upon a general and fundamental principle, which was obscured and lost to the sight of the many by the violence of the controversy. We must penetrate, for that we may, the obscurity, to reach the full meaning of Becket.

I say that the subject of the Constitutions was only a particular, violent instance. The whole controversy, on Becket's side, shows this. Becket always spoke in general terms, even when referring to some immediate object of the fight, such as his own duty to protect property of Canterbury wrongfully taken, or wrongfully kept, by the King. It was with Becket always a question of "equity and justice," as time and again he expressly put it. That was the meaning and equivalent, in

[1] Becket's Letter to the Clergy (1166), Hutton, 145; Giles, I. 360. By submitting the Constitutions to the pope for ratification, the King, as Becket held, admitted the supremacy of the canon law; of which indeed there was other ample evidence. *Ib.*, 263; 231, 232; 317. Letter of the King to the Archbishop of Cologne; *ib.*, 321, 322; letter of the Bishop of London to Pope Alexander.

As a matter of history, however, the old German State was the product of self-seeking individualism, in conquests by military leaders. See *e. g.*, the Franks under Clovis. It was power that dominated, fortune varying accordingly. Ranke, *Papacy*, ed. D'Aubigné, I. 28–33.

terms of law, of the constant and insistent qualification he made in his agreements to the King's demands, "Saving his own order," or "Saving God's honor," a formula which meant that secular law was right if it did not conflict with canon or divine law; that law was universal; the case of the Constitutions fell under it, as one of a thousand cases.

It comes then to this, that Becket's position in regard to the Constitutions put him to the test, and gave him accordingly an occasion of power for stating his whole idea. The contest on his part comes, by reason of its bearings and intensity, to be a portrayal of Becket's whole mind and self in regard to things secular as well as spiritual.

My thesis, I presume, has now become clear. Becket by education and qualities of mind was a collectivist; he would have England governed by morals; he would have the universal rule of equity and justice. Undisciplined individualism was at war with this; it was at war with both the civil and the canon law; it was at war with the laws of God, because it would tear up society.[1] Becket would in theory have *jus honorarium*, the prætorian law,[2] which had finally taken the place at Rome of a narrow, rigid *jus quiritium*. With the later Roman jurists indeed he would no doubt have *jus naturale;* law alike for stranger and citizen, for all men, with equity as the controlling factor, was the kind of law Becket understood and upheld. Rome had outgrown the provincialism of her native, customary law; might not England, we may think of Becket as saying, follow the same course, and bring equity to its place in the administration of justice? Belief that equity, as essentially set forth in the canon law, and as the theory of the later civil law, should prevail, was fundamental with Becket.

There was much at the time to favor and make way for the idea. In the change from Stephen's anarchy to better things, under the strong hand of King Henry, old customs were break-

[1] Even a pagan had said that men exist for the sake of one another, that each individual was but a component part of the whole called society. Becket could not quote Marcus Aurelius, because he was a pagan; or rather because it was better to quote the laws of God.

[2] "(Jus) honorarium dicitur quod ab honore prætoris venerat." Dig. 1, 2, 2, § 10. Equivalent term, "jus gentium," of later Roman law.

ing up; the *jus privatum* — mund right — of the ancient house-father was now spent; the corporate, family right of prosecution and defence, that is, of gain and loss through prosecution of crime and delict by members of the family, was passing away; a criminal law in the modern sense of injured public right, but (because for profit) to be savage and relentless, was at hand; equity was eating into the most ancient remedy of revenge;[1] property rights in land were undergoing change under the newer method of conveyance by feoffment; testamentary power was not far off, its antecedents being already present; contract was a subject of agitation, with every thing to turn upon the result. In a word, the old, native secular law was in the melting pot; what was to come of it no one could tell; but the new secular justice was ready for *jus honorarium* or equity, and Becket was the "bright candlestick" [2] to give the light.

In this state of things the King's attitude towards the landlords is worthy of notice. Disturbers most of them, the barons must be put down, forcibly where force was necessary, peaceably where it was not. To reduce men, whose pretensions had risen so high in the time of Stephen, was to take a long step towards equality. The distractions that prevailed in French feudalism, and were now being repeated in England, could not be permitted to go on under Henry, and his fight and victory over the barons amounted to a fight and victory, so far, for collectivism, and would to the same extent favor the things for which Becket stood. The King was breaking down the fondest hopes of individualism in the baronage; by force, we say, and by peaceful methods. He destroyed its castles; he undermined its money power; he reached for and took its profits in the manor courts, by means of writs and assizes which opened the doors to his officers and judges. New things were to come of this in secular affairs, and the possibilities could not well have escaped the keen eye of the man next the King; "the most influential man in the whole kingdom," said Gervase of Canterbury, "glorious in name, super-eminent in wisdom, the admiration of all men for his nobleness of mind, the terror of his enemies, the friend of the King . . . nay, lord and master of the King

[1] Page 26, *infra*.

[2] William Fitz-Stephen, Becket's secretary (1163).

himself." [1] A commanding figure, in an equally commanding place, with the past yielding, and the present plastic to his very touch, Becket may hold the future of England in his hand. He held the two posts, now the one of chancellor, afterwards the other of Archbishop of Canterbury, which were indispensable to understanding, undertaking and bringing to pass any great reform in secular affairs.

The quotation from Gervase, a contemporary, is of great significance. Becket's masterful influence with the King, down to the special troubles which began after Becket became archbishop (1162), is well attested. It enabled him to bring to bear the power of his legal training and beliefs in the quarter where it could produce the desired effect. Becket's great friend, John of Salisbury, could in the year 1160 truly say that the chancellor cancels unjust laws and tempers, or makes equal (*æqua facit*) — the reference is clearly to equity — the King's mandates; [2] of course with the King's assent. What that would have meant had no breach with the King taken place, one can plainly see.

Of direct significance was the state of things in the courts themselves. The church courts, of which Becket on becoming Archbishop of Canterbury became the head, were of course governed by canon law; which meant that such subjects as the following were of the domain of equity: matrimonial causes, offences of the sexes, breaches of faith, *post mortem* affairs, defamation, and other things. Nor was Roman law unknown in the secular courts; the opposition to it would be sufficient evidence that it was making itself felt. Stephen might silence Vacarius; he could not shut Roman law out of the courts, nor could or would his successors. Glanvill, Chief Justiciar during the latter part of the reign of Henry, writing about the year 1187, refers to it familiarly in his book on Procedure; [3] and

[1] Decem Scriptores, col. 1382. This had already aroused keen jealousy and hatred, as the words "his enemies" indicate. See Hutton, 13, 22, for more definite evidence. Becket's chief clerical enemies were Roger, Archbishop of York, and Foliot, Bishop of London. But without the King they could do nothing.

[2] Giles, I. 99; p. 10, *supra*, note. And in the troubles which afterwards arose, Becket's enemies spoke quite as plainly of Becket's former influence with the King. *Ib.*, 342, letter of the bishops (1166); *ib.*, 381, letter of the Bishop of London to Becket (1166).

[3] See his prologue, "lex sit, quod principi placet et legis habet vigorem," and such a passage as the following: "Crimen quod in *legibus* dicitur crimen lese

Bracton, about the middle of the next century, writing in detail of substantive law, Romanizes, as every one knows, the nomenclature and language of English law, wholesale. Becket would approve of that, and much more; it was of the breath of his nostrils. And the civil courts were manned chiefly by clergy of high rank educated of course in Roman law, though royalist for obvious reasons, in case any difference arose.

Moreover the way was partly prepared for Becket; the principle of *jus honorarium* — the principle of equity — actually and actively prevailed to considerable extent in the secular courts of the time. It probably was general before the adoption (by Henry II) of the writ process and the substitution by the King of his own staff of judges for the doomsmen of ancient custom. These doomsmen had been of the body of the townfolk — their own men — having special knowledge of local custom and law, but having little or no knowledge of any distinction between law and equity; all with them was custom and dooms, and equity more or less was in each.[1] And this continued to be true after the Norman Conquest in all questions of ancient folkright such as title to property found by testimony of the neighborhood, regardless of the feudal ceremony of livery. That is, equity continued [2] long after the general introduction of feudal tenures created by livery of seisin. This was true in the royal courts themselves.

Striking evidence is found in the legality of estates in land held *ad opus;* that is, in lands conveyed by livery, according to feudal law, but conveyed to the feoffee in trust. The records are clear in support of the binding nature of the trust, in the secular as well as in the ecclesiastical courts, until at last the

majestatis." Lib. 1, c. 2. So too *fur manifestus. Placita Anglo-Normannica,* 260.

[1] The difference between custom and dooms was the difference between hard and fast writing and oral and more flexible tradition; a most important difference, as Matilda as well as Becket and the bishops saw. Matilda and they said that the Constitutions should not have been put into writing; plainly meaning that as tradition they might have been equitably observed. Hutton, 104. There was more play of equity without the writing; the chancellor could *temper* the case more easily. Page 17, *supra.* So Becket balked completely and refused his seal to the writing. Hutton, 59; Giles, 1. 220, 221. Writing would turn the doubted customs into dooms.

[2] See a valuable article on other lines by George B. Adams, on the "Continuity of English Equity." *Yale Law Journal,* May, 1917.

effect came home to the landlords. Two or three illustrations may be given.

In the time of William the Conqueror, Wulfstan, Bishop of Worcester, demanded against the Abbot of Evesham extensive rights of service, much beyond those due merely to the relation created by feoffment, in respect of lands by the latter. The abbot denied that the services were due; but the bishop was able to bring witnesses who, in the time of King Edward, had seen and undertaken the services in question *ad opus* of the bishop; and he prevailed, the King's writ of execution declaring that the abbot held all the lands claimed by the bishop *ad meum opus et suum.*[1]

Among many cases in Doomsday Book (1086) the following may be mentioned, as coming before the royal commissioners:

Men of a certain shire testify that Edric, tenant by livery (*tenebat*) of the Manor of Spersold, delivered (*deliberavit*) it to his son, to hold it to farm, giving him (Edric) from the land so long as he lived, the necessaries of life.[2] Again, the Church at Wilton held two hides in the preceding reign, which T. had given to it, out of which his two daughters were to be supported.[3] The neighborhood, in another case, testify that certain lands which William de Percy holds he holds *ad opus* of Robert Malet.[4] So of lands held by Roger de B.; they were held *ad opus* of William de Warren.[5]

In the reign of Rufus the King issued a writ in which he said that lands which were in the hands of certain persons named had been given by the King *ad opus* of the Church of St. Benet, and that the original writs to that effect were in the treasury.[6] A century later, in the year 1200 (1 John) Harlewin complained of William his landlord that William had entered his (Harlewin's) fee and cut down and carried off trees. William answered that his ancestors had enfeoffed Harlewin's ancestors of the woodland in question *ad opus suum*, and that Harlewin (and his ancestors because of relationship) had been *suffered* to take

[1] *Placita Anglo-Normannica*, 17–19. The court was composed of "counties and barons," assembled by command of the King.

[2] *Ib.*, 39, *Doomsday*, I. 59.

[3] *Placita Anglo-Normannica*, 39; *Doomsday*, I. 68.

[4] *Placita*, 51.

[5] *Ib.*, 52; *Doomsday*, II. 12, "*terra . . . ad opus regis.*"

[6] *Placita*, 72.

such wood as was needed. A jury was now to try the question of right, that is, whether Harlewin held the woodland by mere sufferance.[1]

Cases of the kind continue until about the middle of the reign of Henry III, when, except in case of gifts to the use of the Church,[2] they cease; probably because of the awakened sense and pressure of the landlords, whose feudal rights were gone if tenants could in effect put their lands out of their hands in favor of persons not bound by the feudal tie.[3] There was no other reason than feudalism for excluding evidence of the trust, as is shown by the fact that there was no such restriction in regard to personalty; money for instance held by a steward for the lord of the manor. Indeed trusts in land were valid before feudalism came into existence; they are good by *Lex Salica*.[4] Trust was a native idea of the law.

The point of all this is, that in Becket's time, and before and after, the secular courts dealt normally with matters of conscience in regard to property, and were only stopt, when at last they were stopt, by feudalism's waking up to the effect, in a temporary reaction. The right had probably come down from the time, before the Conquest, when churchmen sat regularly in the secular courts, there to give advice in matters of good faith, conscience and malice — in all things pertaining to states of mind in the trial of causes. This was of course in accord with the canon law. Becket had himself no doubt had to deal with such cases, both as chancellor and as archbishop, for they were common enough.

The only interruption of the course of equity, in matters of property, was caused by the writ process; and that was itself amenable to equity for a whole century from the time of

[1] *Rot. Cur. Reg.* II. 120.

[2] Especially to the Franciscans, a "poor" order. See *History of English Law*, I. 229, 235, where the inquiry did not go far enough.

[3] The later statute of *Quia Emptores* could not help matters, for estates *ad opus* were not subinfeudations; there was no livery of seisin to the beneficiary, and livery created the tie.

[4] Title 46. 5th century. See too Gaius, II. 103. So of equity in general, *e. g.*, the *nexli canlichio*, or requirement of performance of *fidem facere*. *Lex Sal.*, tit. 50. Further, of Anglo-Norman times, see *History of Procedure*, 19, 20, 42, 53, 71, 72, 192–196; some of these cases being in the Ecclesiastical Court. Indeed the whole family estate — *res familia* — of primitive Aryan times was a trust.

Becket. But the landlords, as we have seen, finally realized the effect upon them and shut out trusts from the secular courts; with the result that it became necessary, a century and a half later, to create a new court, the Court of Chancery, which should speak where the old courts were compelled to keep silent. And thereafter law and equity must be in competition and conflict. It is true that the landlords might still have gained their point and have ousted trusts even had Roman law been adopted in formal terms in the reign of Henry II; but it is hardly necessary to say that danger of the success of self-seeking, which is always present in affairs of life, cannot detract from any credit Becket might have gained by his own correct statement of principle. And no one can say that the rule of equity in general, well launched by the support of the King, with the aid of the people whom Becket, himself one of them, would have brought to it, would not have proved strong enough to maintain itself against the individualism of a gentry weakened by the change. But it is enough to say that Becket held that the canon law was superior to all secular law in conflict with it; that was of course the very point of his opposition to the Constitutions of Clarendon; and that was equity.

Becket's following by the people, to which I have alluded, should not be passed by. The bulk of the population were with Becket in spontaneous admiration and affection;[1] they constituted a collective mind of the sincerest nature. In the state which actually prevailed that may not have had more influence in bringing to pass the desirable result than the other things spoken of; probably it had no influence at all upon the result; but it would lend courage to Becket, and ensure the cause if he should succeed.

Such were the factors favoring Becket and making clear what a man of his training and character would do. The evidence shows that he would have the essential feature or spirit of canon law, equity, everywhere — in the secular as well as in the church courts. I do not say the canon law bodily — that was for the church courts; nor do I say, the civil law of *jus honorarium* bodily, but the spirit of each, which would regard the

[1] Fitz-Stephen, Giles, I. 52: "The popularity of the chancellor was excessive, whether among the clergy, soldiers or people." (1159.) See *ib.*, 57.

human mind as the measure of conduct in the administration of secular law. That spirit, incarnated in Becket in the post of power, had had full sway for more than eight years, so far as the difference in what lawyers call the subject matter permitted; a difference far too great to permit any bodily substitution of foreign law.

But clouds, slowly gathering in the past, were now rapidly darkening the air, and Becket, not unexpectedly, was turned from the course he would otherwise have gladly and earnestly followed: the Constitutions of Clarendon (January, 1164) were at hand. To that subject I must now call special consideration — a consideration leading to what, so far as I know, has not before received attention.

The contest over the Constitutions was of course a contest between Church and State; that lies on its face. But that means that it was a contest over jurisdiction, as the historians generally say, though further, as I pointed out in my former paper, over sovereignty. I pass by the latter subject, and speak only of the former. The implication arising has been overlooked. Jurisdiction is not a matter of law or of morals [1] between man and man, but of the class of men, or the district, over which the law is to operate; which brings out the particular fact to be noticed touching the Constitutions. With the exception of a single article, the last one, there is nothing in the provisions relating to law itself; there could therefore be no difference between the opposing sides on any such ground. The only question with the bishops was, how the "garments" should be "parted" between the church and the secular courts. With Becket, the "seamless robe" of Christ was being torn asunder.

No difference, I say, divided the King and Becket in regard to law.[2] No objection whatever was raised by the King or by

[1] "There is no schism of faith or of morals between us," said Foliot, Bishop of London. Giles, I. 392, 393.

[2] Becket's opposition to turning over the criminous clerks to the lay courts after degradation by the church courts, on the ground that this would be double punishment (Giles, I. 162), does not contradict this statement. Whether such treatment of the offenders was double punishment had long been a contested question; which was later decided by Innocent III in the negative — it was single punishment in two parts. See *History of English Law*, I. 437, 438. Becket

his party to Becket's view of that matter. The King had appointed Becket out of the very house of learning in Roman law, as his chancellor, and had secured his election as archbishop, having full knowledge of, and of course in sympathy with, Becket's life and education. There were, it is true, differences between canon law and English secular law, as (a little later determined) in regard to legitimation by subsequent marriage;[1] but no question on that point or any other difference of law was raised by the Constitutions. The last article indeed, of the Constitutions, as already intimated, declared a rule of law; the sons of rustics, that is, villeins, were not to be ordained without consent of their landlords. Becket, as a son of the people[2] — the King had said he was a son of one of his (the King's) villeins — probably opposed this.[3] How far he was right in the law is not for me to say, for I have no knowledge of canon law to justify me in speaking; but it is proper even for a non-expert to point out that the contemporary Decretum of Gratian, the famous publication of canon law, merely declares that slaves (*servi*), not the villeins, are not to be ordained without consent of their masters.[4] However that may be, the article in question was apparently considered of minor importance, for it was to receive no specific mention in the controversy. The subject is left then, so far as this discussion is concerned, where it would have been without the article.

It comes then to this: certain half-dozen of the fifteen articles were condemned on the grounds of jurisdiction;[5] there was no serious disagreement of substantive law in regard to

could only *argue* the point — a point of interpretation or meaning of the law. The law itself was the same in both courts; its meaning to this day is in doubt — when is a man twice in jeopardy for the same cause?

[1] Pope Alexander's Extravagant in the year 1172; Glanvill, Lib. 7, c. 15, that it is not law in England. The reason why the landlords opposed this canon law is plain, for who was safe if that law prevailed? But the King could be indifferent, for he had no love of feudalism, with its pulling apart. The King would have a shepherd's crook.

[2] Giles, I. 359.

[3] *Proceedings*, LI. 154, note 1.

[4] Tit. XVIII. c. 2, II. col. 156 Richter ed. The Decretum was completed in the year 1151, being a collection of papal laws. Corp. Jur. Can. Becket probably sat as a pupil under Gratian.

[5] See as to the articles condemned, Becket's Letter to the Bishops, Giles, I. 336, 337, 409, and marked in Hutton, 52–58, on the excommunications.

these articles; and of course there was none at all in regard to the others.

The effect of the Constitutions on the purse was the question. What the King wanted was money, the sinews of a soldier. He would have had no interest in the matter if no difference in that respect had been likely to arise. The contention on the one side was for morals, conscience, equity; on the other it was for downright military, personal profit. Becket wanted canon law; the King had no quarrel with that in itself — he had himself acted upon it.[1] The distinction made by equity, the distinction between the subjective and the objective, did not become clear until the following century, when the landlords came fully to realize that if equity prevailed they were lost. The King only insisted that canon law, or equity, should not be extended to fields which were to furnish funds for him. The King did not stand in Becket's way; Becket stood in the King's way. It was not Becket's law, but Henry's ambition, that defeated Becket and killed him.

In the middle of the 12th century England stood at the parting of the ways. She might have collectivism or individualism, with a great leader in either case ready for the decision; a decision which was to determine the history of England from that time to this. An emergency put an end to England's better hope, upon an issue that was not vital.

It was the particular need calling for action against the criminous clerks that brought on the disaster. Had the Church dealt then with its own criminals with a strong hand,[2] or had the "reconciliation" of Freitval (July, 1170) [3] been sincere on the part of the King, the way for Becket would have been cleared. But jurisdiction was to be fought out; for what might not come next? [4] Becket as Archbishop of Canterbury could

[1] In sending the Constitutions to the pope for ratification.

[2] The Church could deal with such persons with sufficient severity if it would. "Concerning Adam, the forger," wrote Pope Alexander, "our reply is, that you deprive him immediately, whether present or absent, of every ecclesiastical office or benefice forever; and if he ever returns into the country, you will arrest him and place him in the monastery to spend the remainder of his days in solitary confinement." Giles, II. 187. That was the sentence canon law passed upon clerical offenders for the greater crimes. *Ib.*, 164; Herbert of Bosham.

[3] Hutton, 210; Giles, I. 273.

[4] "We have too long borne with our lord the King. . . . For the rest, it is dangerous any longer to tolerate the excesses which he commits in his treatment

not abandon his fold to the wolves. The pity of it is, that the great moral idea of establishing the rule of equity in secular affairs was to be caught and broken on the wheel of an issue which did not involve the existence of church authority and should never have arisen — broken beyond prospect of recovery; for no Englishman appeared or was to appear, after Becket, to take up the cause, with his vision and ability and so much to favor what he stood for. England was to "muddle" along in such way as selfish individualism from time to time suggested, until muddling should come to be defended as the proper way. And England might have had Becket.

> "Had he reigned ten years
> His name had been for aye The Great Reformer."[1]

I should add in the realm of secular law.[2]

Whether Becket's legal collectivism, I mean his mere idea of law, once fully adopted, would have become permanent no one can say; but this is clear: if permanent, it would have changed for the better the whole course of legal history in England. A glance will suffice.

Note the criminal law of the secular courts; what that was

of the Church and of ecclesiastics." Becket's Letter to the Bishops (1166), Giles, I. 336. See also Letter to the Pope (1165), Giles, I. 300, 301.

[1] St. Thomas of Canterbury, Aubrey de Vere. But the plain story is more eloquent than panegyric.

[2] Where Becket's convictions would have led him on deeper questions that arose in later times, whether he would still have held out for the pope and objective unity, or would have given up objective unity and stood with the reformers for moral or subjective unity, one cannot say; there is no sufficient evidence. Such an issue had not arisen. "Blessed be God," said Becket's enemy, Foliot, Bishop of London, "there is no schism of faith between us, no question about the holy sacraments, nor of morals." Giles, I. 392, 393. Letter to Becket. But upon questions of his time, Becket found no such difficulty; no thought arose in his mind of trouble over the papacy itself — that was the accepted bond of unity, accepted by the King himself. The only question that could arise was in regard to the *place* of the papacy, the question in the Constitutions of Clarendon. That could not be vital; Henry's victory did not hurt the Church as a moral force. But Becket might well think the Constitutions the beginning, as he did, of things that *were* vital; hence his unbending opposition. The pope did not consider that any vital issue was raised, and at first wished Becket to yield. Giles, I. 215, 216, 233–235, 325–326. Nor of course did the clergy who opposed Becket consider any thing vital in question. Giles, I. 323, Bishop of London to Pope Alexander. The pope's attempt in 1166 to bring about a reconciliation between Becket and the King is further evidence. Hutton, 176, Letter by the pope to Becket.

and continued to be within living memory everyone knows, and I need only say that had Becket's idea prevailed, that blot on the page of history would not have appeared and the middle ages would not have been put to shame. Instead of making profit out of crime, the King and all men would have found it to be a wrong to society, to be dealt with accordingly. Instead of regarding the body [1] as the agent in wrong-doing, and so requiring mutilations and horrid forms of capital punishment, this barbarity would have given place to punishments which could have been defended, as looking to the state of mind — to the man — and dealing with the body to that end only. There was thus, as Becket pointed out, a "gulf" between the canon and the secular law in this respect;[2] a gulf widened by cupidity.[3] What melioration there was, was due to nearness of the canon law, knowledge of its punishments, and the fact that the judges in the secular courts were mostly churchmen. Canon law, for instance, drew such distinction as was made in the temporal courts in regard to homicide. By canon law, as Becket pointed out, crime turned upon the intent. Thus, said Becket, "if one commit homicide unwillingly, though he is called a homicide and is one, yet he does not incur the guilt of homicide." [4] And that, I take it — the relation of the state of mind to the act — was the principle, according to Becket, upon which human conduct generally should be treated in the administration of justice. That I suppose amounted to equity; [5] and, I repeat, there was no fight between Becket and the King on that subject, or on any serious question of law not touching funds.

But supposing, what does not appear in the contest over the

[1] Or any other moving object, animate or inanimate.

[2] Giles, I. 49, 371; *ib.*, 164, 187.

[3] The King being entitled to all the property of the criminal, succeeding to the ancient family right.

[4] Giles, I. 360. Such was the modification of the process of revenge, which the Church brought about; it was, as has already been said, equity eating into that ancient process — a process in which the family pursuing was its own judge of the case; *that* was the starting point in the history of law, its furthest outpost.

[5] When law deals with all relevant facts, subjective as well as objective, is that not equity, though the cause be crime or tort, as well as when it is trust? Was that not the essence of Roman equity? Were not the rigid, native requirements treated by the prætor as unconscionable exclusion of good men from the protection of law?

Constitutions, that the King did object to law which Becket would have, that would only raise one's estimate of Becket. He had taken his stand; he would not be moved by any obstacle. His fight against the Constitutions is sufficient evidence of that. He held and would still hold that equity should be administered in all courts of justice, since it dealt with the very self of responsibility, and anything short of that would be paganism. The fight would be the harder if the King opposed; but to find man opposing the divine will was the very thing the Church had always to assail. Becket would have flung himself all the more into the conflict.

And now to return to changes, what shall be said of contract, that commonest and most necessary of things in life? Could one, in the absence of evidence, be brought to believe that there was no true doctrine of contract in the secular courts of the middle (by which I mean Norman and sub-Norman) period of English legal history? Lawyers know that there was none; that is the first thing a law student learns, at least it was the first thing I had to learn — but did not. A makeshift, an interminable web of subtle and useless refinements and distinctions, in which justice was hopelessly ensnared, to the delight of sophists then, and of antiquaries now, took the place of profound common-sense. The secular courts were forever discussing and dealing in technicalities concerning matters of mere form — debt, covenant, oral promise, misfeasance and nonfeasance, and all the rest; until finally, after centuries of wandering in the wilderness of speculation, they worked out a notion of contract, in which we are living today, as arising, not out of the plain and (by the Romans at least) sacred fact of promise, but remotely out of wrongs — things *ex delicto*.[1]

[1] The canon and civil law treated breach of faith, which included contract, as sin, quasi criminal, but did not derive contract from delict; breach of contract *was* delict, and of the strictest sort. In Roman life Fides was a divinity greatly revered both in public and in private affairs. Aul. Gell. xx. i. 39. Her seat was said to have been in the right hand. See also Ed. Chilp. c. 6 (Merkel, *Lex Sal.* 77), promise — "cum dextra [manu] auferat." Sohm, *Process*, 81. And our modern oath with uplifted right hand. Was the physical hand clasp at Rome a symbol of the mental *promittere* or promise? Probably it was. See Muirhead, *Law of Rome*, 22, 50, 142, 165.

One result of the difference between Roman and English law may be seen in the legal doctrine of consideration, with all its subtleties; by church and civil law, consideration had its weight; by English law, contract was a matter of form,

"But 'twas a famous victory," this final winning of contract from tort.

And on the side of delict or tort the same sort of thing was going on; with the Roman law of *culpa*, for instance, at hand and fully developed, for general guidance, it was not until the 19th century that there can be said to have been a doctrine of negligence; and still the doctors disagree over the theory.[1] Meantime the judges had been at first going no further than to say, that if a man undertook a thing, such as to ferry goods across a stream, or to thatch a roof, and actually began it, he ought to do it properly, not negligently; but if he undertook it and did nothing, what then? Oh, it was perhaps only *parolz*, no "specialty" — nothing in a word, but rubbish.

All this long-drawn-out waste, when questions of life and liberty as well as property were in the balance. The Church was near, with its plain ideas of faith, of "equity and justice," actually proceeding, so far as permitted, in a straightforward way of enforcing promises. And so the answer to secular forms of justice is to be put as before — England might have had *jus honorarium* for theory, instead of the slough into which she was to slip.

The writ process as understood in the 13th century finally drove equity out of the common law courts; that is, whatever remained of it in matters, chiefly of property, in which writs of the King were used for instituting actions in those courts. I say nothing of the Council with its almost unlimited power, as not specially bearing upon my theme; the Council had always existed, but no general policy touching law was ever in terms formulated by it — nothing such as I am speaking of, except that, by its action in the Provisions of Oxford (1258),[2] it restrained the use of new writs, action which only hastened the destiny of modern equity.

The King's writ, clever device of a skilful commander, virtually determined the law touching the right to be asserted under it, and the way was now blocked to everything else,

and is so still for special purposes; so it was by *jus quiritium*, but by prætorian law contract was in itself of *jus honorarium*, of conscience.

[1] There was of course disagreement among the Romans, but it was not about fundamentals; the *theory* was settled on common subjects.

[2] *History of Procedure*, 197, 198.

unless, what seldom happened (so difficult and expensive was the undertaking), Parliament or Council could be induced to interfere. And so, I say, equity was put out of the common law courts. With what result? The situation became intolerable, and all kinds of devices were being invented to avoid the rigidity of the law; until at last, about the end of the 14th century, the Chancellor of England, with the King's sanction, made as a stop-gap a court of himself, to be called the Court of Chancery. This was intended, among other things, to rejuvenate a bankrupt equity, particularly with regard to trusts; it was to be a court of conscience, founded on the canon law and manned until later times by ecclesiastics. So it was to take off some of the work of the Council and of Parliament.

All this is familiar enough even to laymen, and need not have been said but for the emphasis it bears upon the calamity which befell England when Becket was foiled and defeated — under that unfortunate issue. Confusion was certain to follow and increase; confusion immediate, and more confusion finally. The courts of the land were tied hand and foot, apparently with their own consent — did they not decline to be released? [1] — tied, I say, to rigid law, to the language of writs; *jus honorarium* was impossible. The Court of Chancery was the only remedy; and now, from that time until the last quarter of the 19th century, England, followed by America and English-speaking lands generally, was to be witness to the marvel of judges of rival courts flinging jurisdictional fictions at each other with all the effect of reality.[2] And that was to go on until, in America at least, *severance* of justice was to come to be considered fundamental and hence unavoidable, if not desirable.

I have but glanced at one or two phases of the English law in the middle and modern period, but they are as characteristic as they are outstanding. I have had in mind particularly the subject of equity, as rightly making a normal and fundamental part of the law. The courts should always have been able to administer justice in whatsoever way the facts of a cause, sub-

[1] The Stat. Westm. 2, c. 24, giving actions "on the case," was narrowly construed by the judges to be helped by it, if they would.

[2] The Commons in early times held that the entire jurisdiction of the Court of Chancery was fictitious; the State alone could create courts.

jective as well as objective, as they developed, should suggest. It should never have been necessary to create a court which should have a monopoly of conscience. In a word, there should have been no division of courts, and there would have been none if legal collectivism had prevailed. All courts should have had equity powers, and would have had them if the great opportunity had not been allowed to pass. Theory might have been settled, to steady affairs of the law — to give solidarity to the law; of course no action could be expected to settle questions of detail, or doubts to arise under unknown change of conditions in the future. But equity, not to go further, is fundamental.

The Judicature Acts (1873, 1875) took a long step in the right way, but they should have been unnecessary. The step should have been taken in the reign of Henry Plantagenet. Thomas of Canterbury had the mind and the courage to take it, but an untimely issue of jurisdiction turned him away and slew him; still he fell, and lives, a mighty prophet of the doctrine that law is founded in morals, in the sense that mind, the direct cause of conduct, must be the true measure of responsibility, in secular as well as in religious government. Recognition of this doctrine is steadily gaining ground.[1]

[1] Taking equity as normal, it follows that Benthamism, or utilitarianism, which would look only to effects or consequences rather than to mind as cause (of course it was not denied that mind was cause) was a counter-current, or reactionary. It gained momentum in the latter part of the nineteenth century, but (apart from statute and contract) appears now to be on the wane as a principle of liability. No rule of law can shut out mind as the responsible cause of conduct. That men exist for the sake of one another, that is, for the sake of society, does not make the test of liability solely objective; society is only collectivism founded on self-discipline, which, for the present purpose, is *equity*.

On the whole subject, Mr. Brooks Adams calls my attention to St. Paul and Romans, VII. The old native law, or self-seeking individualism, is the "flesh" warring with enlightened law and equity as the "spirit," or legal and moral collectivism. So Thomas Aquinas in the 13th century (a slip may be noticed in d'Aubigné's translation of Aquinas, Ranke's *Papacy*, I. 506, note), and later Churchmen in general on the relation of soul and body — *e. g.*, Cardinal Bellarmine, with Paul Sarpi of Venice drawing the opposite inference as to Church and State — referred to at length by Ranke, *ut supra* and at pp. 615–620. There can be no permanent bridging of the two ideas of the soul and the flesh; but there should be unity in law and morals — of the soul itself in its moral function — to include the point reached by Roman *jus honorarium*. This is no question of Church and State; the relation of soul and body being no more than a disputed and very doubtful analogy.

Alexander Grant to Patrick Grant, 1840.

The following letter has been presented to the Society by Judge Grant. This Alexander was son of John and Elizabeth (Whyte) Grant of Leith, and was one of six brothers who engaged in commerce in widely separated parts of the world. Alexander (b. 1769), as is shown, was in St. Petersburg, Russia, Isaac (b. 1770) in Leghorn, Italy, Charles (b. 1775) in London and John (b. 1779) at Genoa. A fourth, Patrick (b. 1777), came to America as the agent of Grants and Balfour of London, Genoa and Leghorn, houses established by his brothers Isaac and John. In 1807 he married as his second wife Anna Powell Mason, daughter of Hon. Jonathan Mason, United States Senator from Massachusetts, 1800–1803. It was to his son Patrick (b. 1809), that this letter is written.

Alexander Grant to Patrick Grant.

St. Petersburg, 10th/22d March, 1840.

My dear Nephew,

I don't know whether you are aware of, and sincerely hope you do not inherit, a propensity characteristick of our family — I myself, the unworthy head, possessing my full share of it — to that "thief of time," procrastination. To that alone I pray you to attribute my having thus long deferred expressing the gratification I experience at receiving a letter the whole tone and tenour of which confirms the opinion I had formed of the head and heart of the writer, from personal communication with others. Besides your friend Mr. Tappan, I had the pleasure of hearing of you from a Mr. and Mrs. Bates, the latter, I understood, an intimate friend of your dear mother, on which account we were very desirous of cultivating their acquaintance, but were unfortunately prevented from doing so by the illness of Mrs. B. and *my* Mrs. at the same time, while they remained here, subsequently to my forming their acquaintance. Not so was the case with another of your townsmen, a Mr. Sumner,[1] of whose company we had enough and to spare. He is the very Coryphaeus of "inquisitive travellers" — his

[1] George Sumner (1817–1863), a younger brother of Charles Sumner. Some letters from him are in *Proceedings*, XLVI. 341.

thirst of information, certainly, very commendable; but, really, his enquiries so minute and their objects so multifarious, that he became at last rather a *bore*. I hear he has been traced to Constantinople, and means to extend his tour to Egypt, in which case I should not at all wonder if he gets introduced to Mohamet himself, and (who knows?) have a finger in the pie in those negotiations which appear to puzzle the brains of all *European* diplomatists; for, I assure you, he has a knack at gaining favor with the mighty ones of the earth. During the grand reviews in this neighbourhood, he mounted a hack and got introduced to the grand Duke Michael,[1] the Emperor's brother, whom he very unceremoniously asked to introduce him to the latter,[2] and who, amused with the oddity of the application, consented, and called in as interpreters the Empress [3] and her daughters. They talked a great deal about America, and, among other things, one of the grand dutchesses asked him whether it was possible that there were no *servants* there, to which he replied, *holding up his finger* (his own account of the affair) "Ah, *Miss*, I see you have been reading mother Trollope"! One thing I learnt from him which gave me great pleasure, which was, that his brother, a schoolfellow of yours, had told him you were an excellent classical scholar. I hope you do not lose what you have learnt, as your two older cousins have, I am sorry to say, done almost completely; but, on the contrary, keep daily adding to your store. I can bear testimony to the truth of what Cicero says on this subject (I am not sure that I quote exactly) "Haec studia adolescentiam alunt, senectutem oblectant, secundas res ornant, adversis perfugium ac solatium praebent" etc'a. I proceed to answer your kind enquiries about your *Russian* relations. Your Aunt is almost literally so, having been born in Mosco, and, at ten years old, known no other language than Russ and French — though she subsequently exchanged both for *Scotch-English*. Fortunately *I* have not quite forgotten that dialect; so that, in this, as in other, respects, we have contrived to keep up a tolerably good *understanding*, during a union of twenty-eight years. Your

[1] Michael-Paulowitz (1798–).

[2] Nicholas I (1796–1855).

[3] Frederica-Louise-Charlotte-Wilhelmina, daughter of Frederick William III of Prussia.

male cousins are four in number — all, I am glad to say, well conducted, industrious and high-minded fellows. Two of them are quill-drivers in eminent mercantile houses here and I hope, in time, may get on, tho' promotion is not so rapid now a days as in my time. I had three offers of partnership the moment my apprenticeship expired. The two younger are at Glasgow, learning the business of civil-engineering. They had both a strong desire for the sea, but fortunately got the better of it, and *lowered* their ambition to becoming Watts or Arkwrights instead of Howes, Nelsons, or, if you will, Porters. It is a hard life — they work like common men from 6 in the morning till the same hour in the evening, and come home "begrimed and black" as Othello's face — all for nothing too; for, instead of receiving wages, they pay a premium and live at their own expence. However it is a famous career, and I look upon the outlay as "casting bread upon the waters, which will return after many days." Our girls [1] are allowed on all hands to be the flower of the English colony here — in mind, manners and appearance. The eldest has had several offers of marriage, as *I* thought, eligible ones; but she is rather fastidious — perhaps I should say too conscientious to give her hand without her heart; and it is a point upon which I think any exercise of parental authority misplaced. I hope, as they say these matters are settled in heaven, that the predestined for both may soon be forthcoming; for, at my time of life, I am naturally anxious to see them settled before I am called away. Thank God, I enjoy perfect health as yet, better even than I did 25 years ago, but still, as the Duke of Norfolk said, my lease is out and I am but a tenant at will. I may say all I have about these wenches, without the imputation of any *sinister* designs upon you, as a bird has flown across the Atlantic which has chirped that *your* matrimonial lot is cast. This is as it ought to be. I *guess* you are just about the age when domestic enjoyment ought to take place of the dissipation of youth; and, from what I have heard of your fair intended, you have every prospect of happiness. Much indeed should I enjoy an opportunity of witnessing it, and of making the personal acquaintance of a family in which I have always taken a great interest — but

[1] Eliza and Mary. Mary married a Mr. Gwyer.

that is past praying for. I am more likely to pass the Styx than the Atlantick. Some of my sons may be more fortunate, perhaps those in business may be sent by their employers to *beat the St. Petersburg march* for correspondents in the States, and the engineers may also be induced to emigrate to so fine a field for their exertions. I had accounts lately *of* my Italian *fratelli* — direct intercourse with them has, I am sorry to say, been long suspended; for on a visit, many years ago, to Italy, I cannot say I found, either in Florence or Leghorn, a *Philadelphia*. Poor Isaac has been, sometime, all but blind, from a cataract for which I hear he has lately gone to undergo the operation of couching at Vienna. In the meantime he enjoys excellent health, and, as usual in such cases, by a kind dispensation, remarkably chearful in spirits. *Don Giovanni* seems quite happy in his somewhat anomalous ménage — his wife second only to Malibran, as a singer, but I rather fear, a vox et praeterea nihil. By the way, I got all this information from a man who, I think, said he had known you, a Count Baciochi who, during his stay here, was quite faufilé chez nous, and afforded us great amusement — more or less of a *buffone*, but on the whole, gentlemanly enough. He came here on a business which will sound odd to republican ears, namely to obtain the *emperor's consent* to the marriage of one of his subjects with the daughter of Jerome Buonaparte,[1] the renegade husband of your Miss Paterson.

We have heard nothing for a long time of your (I believe) former chum, Elliott Smith. He is established at Havre, and, I dare say, doing well, having come into a little property at his father's death, to begin with, and, along with it, inheriting a good portion of that "saving grace" which was a prominent feature of the jolly old father's character. At all events, I rejoice at his (and your) having betimes got out of that sink of iniquity and grave of all right feeling — Italy.

By the kindness of Mr. Chew,[2] the American chargé d'af-

[1] Jerome Bonaparte's wife, Catherine Frederica, of Würtemberg, died in 1835. Their daughter, Mathilde-Lætitia-Wilhelmina, born at Triest, May 27, 1820, married November 1, 1840, Count Anatole Demidoff (1812–1870), from whom she separated in 1845.

[2] William W. Chew of Pennsylvania. He was Secretary of Legation at St. Petersburg, 1837–1841, and was succeeded by John Lothrop Motley. Chew was under George M. Dallas, then Minister.

faires, I am enabled to send this free of postage; and that being the case, I take the liberty of troubling you with the inclosed to a very old friend of mine in Canada, and of desiring him to send his answer thro' you, to be forwarded by any of your Captains coming this way.

Having thus made up — at greater length than you may have found amusing — for past neglect, I beg, in conclusion, to say, that I shall be most happy to hear occasionally of yourself and your amiable mother and sister, with kindest remembrance to whom in which I am joined by all my family, I remain your affectionate uncle,

A. W. GRANT.

N.B. The same individual whom you will have heard designated as *Alex'r* only. I assumed the initial of my second Xian name (Why?) when I lived in London to distinguish myself from numerous namesakes of the Clan there dwelling.

[Endorsed] Patrick Grant, Esq., Boston, U. S.
[In another hand] Recv'd and forw'd by Yours etc. J. J. Bedr — N. Y. Ma[il].

Remarks were made during the meeting by Messrs. STORER, RHODES, and WINSHIP.

MEMOIR

OF

ARTHUR THEODORE LYMAN

By CHARLES WILLIAM ELIOT.

ARTHUR THEODORE LYMAN (Harvard A. B. 1853) was born in Boston, December 8th, 1832, and died in Waltham, October 24th, 1915. His inheritances were varied and interesting. His great-grandfather Isaac Lyman was minister at York, Maine, for sixty years; but the diary of this long-lived Congregational minister shows that he took quite as much interest in the medical problems of the day as he did in the functions of a parish minister. His grandfather Theodore Lyman, son of Isaac, started young in business with nothing but his character and his diligence, and became one of the richest merchants in Boston, trading mostly with the Far East. Theodore Lyman's own education having been scanty, he became a well-informed man through reading and the wise conduct of a growing business and an expanding family and social life. He sent his three sons to Harvard College. When he had acquired wealth, he resolved to create a fine country estate at Waltham with all the customary adjuncts of an English gentleman's estate; and to this pleasant and instructive task he devoted much time and study during the latter half of his life. This estate descended to his oldest son George Williams Lyman (Harvard A. B. 1806), and from George to his third son Arthur Theodore Lyman, the subject of this sketch. The care and proper development of this estate, with its woods, fields, greenhouses, gardens, live-stock, roads, paths, brook, and pond were Arthur Theodore Lyman's chief occupation, apart from his business activities, from youth to age. His family life centred there. Two of his married sisters had their country houses on the estate; and his oldest son Arthur (Harvard A. B. 1883) has now inherited it.

Arthur T. Lyman

The principal house on the estate has therefore belonged to four successive generations in the male line — a rare happening in American society.

The business career of Arthur Theodore Lyman resembled in certain respects that of his father George. Both began with the East Indian trade, the main business of George's father Theodore Lyman; and both were diverted after comparatively few years to the great cotton manufacturing industry of New England. Between 1860 and 1915 Arthur was director, treasurer, or president of a large number of manufacturing and financial companies. Educational and religious institutions, such as Harvard University, the Boston Athenæum, King's Chapel, and the American Unitarian Association, also received from him long and assiduous service. He was a member of the vestry of King's Chapel for fifty-two years, and Senior Warden for thirty-eight years. Hospitals and unsectarian charitable societies commanded his habitual support. He was very diligent in business, possessed a sound judgment and much public spirit, and therefore carried weight among business associates, and educational, religious, and charitable workers. He was independent in thought and firm of purpose, but also sympathetic, kindly, generous, and just. His wife Ella Lowell bore seven children of whom six survive; so that he was surrounded in his age by a large and happy group of children and grandchildren.

His life illustrates admirably the New England ideal of a fortunate, quiet, conservative, honorable, and useful private citizen.

MEMOIR

OF

ABNER CHENEY GOODELL, JR.

BY THOMAS FRANKLIN WATERS.

MR. GOODELL was fortunate in his forebears. He was born in Cambridgeport, Massachusetts, on October 1, 1831, the son of Abner Cheney Goodell, Senior, and his wife, Sally Dodge Haskell, daughter of Aaron and Eunice (Dodge) Haskell of Ipswich. His father, son of Zina and Joanna (Cheney) Goodell, was named after his mother's brother, Abner Cheney, a Dartmouth graduate of 1796, a man of most lovable character, and an accomplished scholar and school-master, who died at the early age of thirty-two.

Zina Goodell was in the sixth generation from Robert and Katherine (Kilham) Goodell, the immigrant, who settled in Salem but soon removed to Salem Village, now known as Danvers. He was a machinist by trade and singularly versatile in his craft. It is said that he invented the first printing press that printed both sides of a paper at once, a process for preparing copper and steel for engraving, and machines for making kegs, shoe pegs, pump logs and other practical uses.

On his mother's side, Abner, Junior, was a kinsman of Nathan Dane, the eminent lawyer and founder of the Dane Law School at Harvard, and Paul Dodge, a distinguished Vermont lawyer. While he was an infant, his parents removed to Ipswich, but soon returned to Cambridgeport, and in 1837 made their home, which proved to be permanent, in Salem. Here he attended the public schools and was graduated from the high school at the head of a class, which included the famous brothers, Hon. Joseph H. Choate and Judge William G. Choate and Hon. Darwin E. Ware. Though the way did not open for him to go to college with his brilliant classmates,

MHS

Abner Cheney Goodell, junior.

and the prosaic work of a machinist in his father's shop engaged him after his school-days were ended, he did not lose his ambition and enthusiasm as a student. He carried on his studies in his leisure hours in Latin, French, mathematics and English literature. In his French, he took a course under Napoleon H. Jerome, the editor of Wanostrocht's French Grammar, but had no instructor in his other studies. He had inherited his mother's fine literary tastes and as the family library was unusually rich in standard works, he read widely and was exceedingly fond of poetry, especially Milton and Pope, and committed much to memory.

Happily his uncle, George Haskell, Esq., a lawyer of Ipswich, observed the studious habit and scholarly promise of the lad. At his suggestion, the young Abner, then in his eighteenth or nineteenth year, left the machine shop and came to Ipswich to begin the study of law. Three years were spent in legal studies in his uncle's office and in the office of Northend and Choate in Salem, and in November, 1852, he was admitted to the bar. He opened an office in Lynn in January, 1853, and his ability as an attorney was soon recognized. In his criminal practice, it is said, he never lost a case. But he preferred civil law, and made it his specialty. Two of his reported cases before the Supreme Judicial Court involved decisions, which are still cited as authorities in this country and in Great Britain.

Notwithstanding his brilliant prospects as a lawyer, his profession was not wholly to his mind. In 1856, the new Court of Insolvency for Essex County was organized. Mr. Goodell was appointed Register, and was elected to that office in the following year. When this court was merged with the Probate Court, he was elected in January, 1858, Register of the Courts of Probate and Insolvency for Essex County. He then closed his law office in Lynn, removed to Salem and withdrew from legal practice. He was continued in office as Register by successive re-elections for twenty years, until 1878.

The year 1865 found him actively engaged in a variety of public services. In that year he was chosen an alderman by the unanimous vote of the citizens of Salem, and in the single year that he held office, he had a leading part in instituting the Water Department, drawing the ordinance which estab-

lished the Board of Water Commissioners and defined their duties. In the same year he was chosen president of the Salem and South Danvers Street Railway Company, which had accumulated a debt of $40,000 in its brief existence of twenty months. He held that office for nineteen years, managing its affairs with such skill that the almost worthless stock attained a market value of $200 a share, and paid twenty-two per cent dividends for the last few years of his presidency. His office windows in the Court House overlooked the line, and if he saw a driver belaboring his horses as they climbed the rising ground, he would throw up the sash and rebuke the astonished man in stentorian tones, which roused the neighborhood.

Always open to the latest schemes of improvement, he proposed the first line of electric railway between Salem and Marblehead but was refused a location. He recognized at once the value of the telephone. His friend, Mr. George G. Putnam, in his appreciative sketch of his life, states that when the first experimental telephone line between Boston and Salem was operated by Alexander G. Bell of Salem in 1877, Mr. Goodell was enthusiastic in predicting its future usefulness and financial success, and offered a set of Resolutions, which were adopted at the meeting.

But the year 1865 is significant chiefly from his entrance upon a new field of professional labor, which was destined to be his real life-work. He was appointed by Governor Andrew a commissioner, with John H. Clifford and Ellis Ames, to prepare for publication a complete copy of the statutes and laws of the Province of Massachusetts Bay, from the time of the Province Charter to the adoption of the Constitution of the Commonwealth. In 1867, with Ellis Ames, he was appointed a commissioner to print these records.

This work was very congenial to Mr. Goodell. His antiquarian tastes and love of research had been manifest in his brief biographies of the Registers and Judges of Probate for Essex County, his sketch of Alonzo Lewis, and a study of Thomas Maule of Salem, with a review of the early Antinomians of New England, all of which appeared in the publications of the Essex Institute in 1861. He followed these with a paper on the Puritans and Separatists in 1862, and in

1865 and 1866, with a series of abstracts from the Essex County Quarterly Court Records, 1637–1641. In appreciation of his literary activities, Amherst College had bestowed on him the honorary degree of Master of Arts in 1865. His legal training had fitted him for discriminating comment and appreciation of collateral material.

The first volume of the *Acts and Resolves*, 1692–1714, with a prefatory history of former publications, and historical and explanatory notes, appeared in March, 1869. Volume II, 1715–1742, was published in 1874, and Volume III, 1743–1757, in 1879. Up to this time, Mr. Goodell had received no compensation, and had divided his time between his duties as Register and his editorial work. But in 1879 he began to receive a salary. He had resigned his office as Register in 1878, and in 1884 he severed his connection with the street railway. His whole time and thought were now given to research for collateral material and preparation for publication, and it became an engrossing passion. When Volume IV, 1757–1768, appeared in 1881, it was found that nearly a quarter of the thousand pages was given to fine print notes of the most exhaustive character. Volume V, 1769–1780, was published in 1886.

The legislation of this critical period is of supreme interest and value to all students of the history of the United States and it appealed irresistibly to Mr. Goodell's instincts as lawyer and historian. He had delved patiently and with the most minute care in every field of research. Council Records, House Journals, State Archives, Governor Hutchinson's *History*, the treasures of the Public Record Office in London, Journals of Congress, Town and Parish Records, Town Histories and the newspapers of the day were searched. More than a third of the volume was given to the notes, which not only elucidated all legislation of a general nature and public value, but included a series of invaluable studies of important events in the history of the towns, the formation of new townships, the division of parishes, and the erection of new meeting houses, which often involved prolonged legal quarrels.

The next volume in chronological order, Volume VII, 1692–1702, called by Mr. Goodell, Volume II of the Appendix, bears the date 1892. It reverted to the earliest period, and applied

the same critical and illustrative method he had now adopted. Half of the whole number of pages was given to the notes. Volume VIII, 1703–1707, Volume III of the Appendix, published in 1895, allowed 600 of the total 800 pages for the notes.

The slow progress of the work naturally created difficulties in the way of its completion. The great expense involved, and the excessive elaboration of the notes aroused opposition. Appropriations for its continuance were made with growing reluctance. At times work was suspended completely. Mr. Goodell made himself responsible for the expense of editing at critical periods. His enthusiasm surmounted all obstacles. His ambition to make the series the most valuable of its kind never abated. He could not consent to any scheme of abridgment. Sharp variances with the Governor and Council arose, and in 1896 he was removed from office. Volume VI was nearly ready for publication and Volume IX as well. Although the plates for the sixth volume were cast, it was arbitrarily reduced to about a third of its intended size.

Two years later, the question of the continuance of the publication was re-opened, and a committee of the Legislature was authorized to secure Mr. Goodell's services. But he could not resume the task. Thirty years had been spent in his monumental labors, which are the more remarkable from the fact that from birth, he had the sight of only one eye, and his editorial work required the protracted study of ancient manuscripts, sometimes almost illegible. He was still in the prime of his powers. His vigorous health gave promise of many fruitful years. It will always be a matter of regret to all students of history that his editorial work was not continued indefinitely. Particular value would have attached to his notes on witchcraft, in connection with Chapter XVI in Volume VI.

His studies in this field began in 1870 with a review of Upham's *Salem Witchcraft.* In 1883, he contributed an article on the "Witch trials in Massachusetts" to the *Proceedings* of the Massachusetts Historical Society, which was followed the next year with "Further Notes on the History of Witchcraft in Massachusetts" and a third paper in 1885. He chose for the theme of his address before the Danvers Historical Society in 1892, "Witchcraft Considered in its Legal and Theo-

logical Aspects." His private library was especially rich in its collection of early witchcraft literature.

Mr. Goodell was a member of many societies. He was elected a member of the Massachusetts Historical Society in March 9, 1871. He served as a Member-at-Large of the Council from 1885 to 1887. He became a member of the New England Historical Genealogical Society in 1862, was a Director in 1884 and President from 1887 to 1892. He was a life-member and Senior Vice-President of the Essex Institute, member of the Colonial Society, Fellow of the American Academy of Arts and Sciences, corresponding member of the Historical Societies of Maine, New Hampshire, Rhode Island and New York, and was an honorary member of the Harvard Chapter of Phi Beta Kappa.

His published writings include many addresses and papers on historical and genealogical subjects. Now and then he ventured into poetry. He contributed a hymn for the Lincoln Memorial services in Salem, a "Salutation to the Colonial Flag of Massachusetts" at the entertainment of the Ancient and Honorable Society in June, 1888, and the "Repulse of Beaucourt," read at the annual dinner of the Colonial Society in 1894.

Mr. Goodell married on November 26, 1866, Martha Page Putnam, daughter of Alfred and Mary (Page) Putnam of Danvers, Massachusetts, a granddaughter of John Page and great-granddaughter of Lieut. Col. Jeremiah Page of Revolutionary fame. Two sons were born to them: George Haskell Goodell of St. Paul, Minn., born December 26, 1870, and Alfred Putnam Goodell, born February 18, 1875.

His last years were spent quietly and happily amid his books in his attractive home on the site of the ancient jail in Salem, where he died July 19, 1914 in the eighty-third year of his age.